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From:

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To:

Cc:

Subject: 409A

Regarding our phone conversation, I could find the language that I described to you.

However, I would argue that § 409A(a)(1)(A) provides that amount deferred under a nonqualified deferred compensation plan are included in gross income. Section 409A is not dependent on other provisions generally, rather it provides its own set of rules. Section 409A supersedes the general rules with respect to constructive receipt that exist under § 451 and under case law. See § 409A(c) (providing that earlier inclusion may be required under other provisions, and that amounts that are includable under § 409A are not again included in gross income where includable under another provision at some later date). Therefore, § 409A and the regulations thereunder operate independently from §§ 451 and 83 except where otherwise specifically provided. The following from Notice 2008-113 indicates that an option that is exercised cannot be corrected for § 409A purposes, even if it is corrected in the same taxable year.

D. Correction of Exercise Price of Otherwise Excluded Stock Rights

1. Relief for Amounts to which § IV.D Applies

If this § IV.D applies to a stock right, the stock right is treated from the date

of grant as not providing for a deferral of compensation for purposes of § **409A.**

2. Amounts to which § IV.D Applies.

This § IV.D applies if during a service provider's taxable year a failure occurs

that is described in § IV.D.2(a) and the requirements of § IV.D.2(b) are met.

(a) A failure is described in this § IV.D.2(a) if, under the terms of a stock right, the stock right would not provide for a deferral of compensation under §

[1.409A-1\(b\) \(5\) \(i\) \(A\)](#) (excluded stock options) or [§ 1.409A-1\(b\) \(5\) \(i\) \(B\)](#) (excluded

stock appreciation rights), except that the exercise price of the stock right is

erroneously established at less than the fair market value of the underlying stock

on the date of grant.

(b) Before the stock right is exercised and not later than the last day of the

service provider's taxable year in which the service recipient granted the service

provider the stock right, the exercise price is reset to an amount not less than

the fair market value of the underlying stock on the date of grant.

3. Example

In the following example, it is assumed that Employee is an individual whose taxable

year is the calendar year and Employee and Employer both satisfy the applicable

requirements of §§ III and IX of this notice.

Example: On January 1, 2009, Employer grants Employee a stock option to purchase

100 shares of stock, and the stock option otherwise would not provide for a deferral

of compensation for purposes of § 409A except that due to an error the exercise

price is set at an amount below the fair market value of the stock on January 1, 2009. On July 1, 2009, Employee partially exercises the stock option and purchases

40 shares, but retains a stock option to purchase 60 shares. Provided that before the earlier of January 1, 2009 or the exercise of the remaining stock option

to purchase 60 shares, the exercise price of the stock option to purchase 60 shares is reset to a price at or above the fair market value of the underlying

stock on January 1, 2009, the stock option to purchase 60 shares may qualify for

the relief provided in this section. Because the exercise price was not reset before

the exercise on July 1, 2009, the portion of the stock option that was exercised

to purchase 40 shares is not eligible for the relief provided in this section.

The § 409A regulations provide that options issued at a discount are considered nonqualified deferred compensation for purposes of § 409A.

(5) Stock options, stock appreciation rights, and other equity-based compensation--(i)

Stock rights--(A) Nonstatutory stock options not providing for the deferral of compensation.

An option to purchase service recipient stock does not provide for a deferral of compensation if--

(1) The exercise price may never be less than the fair market value of the underlying stock (disregarding lapse restrictions as defined in § 1.83-3(i)) on the date the option is granted and the number of shares subject to the option is fixed on the original date of grant of the option;